IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 168/90

BETWEEN RAINBOW CORPORATION LIMITED

Appellant

A N D RYDE HOLDINGS LIMITED

Respondent

Coram: Richardson J (presiding)
Casey J
Hardie Boys J

Hearing: 2 May 1991

Counsel: A R Galbraith QC for Appellant
C B Atkinson QC and P R Van Rij for Respondent

Judgment: 2 May 1991

JUDGMENT OF THE COURT DELIVERED BY CASEY J

This is a Notice of Motion by Rainbow Corporation Ltd for conditional leave to appeal to the Privy Council against a judgment of this Court delivered on 13 November 1990, which upheld the judgment given by Hillyer J in the High Court at Auckland in favour of Ryde Holdings Ltd. In that judgment he found liability on the Corporation in respect of transactions between the parties involving video machines. He directed the amount payable to Ryde be determined by arbitration. The arbitrator duly issued his award and

Rainbow applied to have it set aside. In his judgment of 7 June 1990 Hillyer J did so, and directed the arbitrator to hear further submissions and for his guidance he indicated that Ryde was entitled to a share of the total proceeds based on 100% of the income from the video assets and not just 15% as contended for by Rainbow. There was an appeal and cross-appeal and in the judgment of this Court of 13 November (in respect of which this present application for leave has been brought) we directed that the award should go back to the arbitrator for further enquiry into the figures set out in part of that document, as it appeared there may have been an arithmetical error. We also upheld the Judge's direction about income apportionment.

At the time the Motion for leave to appeal first came before this Court on 11 February, we were informed that there had been no final outcome on the reference back to the arbitrator, and the matter was adjourned to be brought on at 7 days notice with costs reserved. At the request of Ryde, the application now comes before us again (having first been called yesterday) and we are informed that the arbitrator confirmed the figures in his award, whereby Rainbow was directed to account to Ryde for $1.75m, and that a further application had been made to the High Court by Rainbow to set that award aside. We are also informed that Hillyer J dealt with this in his most recent judgment of 11 April 1991 and upheld the award again. After indicating that the

application to set it aside was refused he added - "The application to enforce I think cannot be dealt with until the Court of Appeal deals with the application for leave to appeal to the Privy Council". Accordingly, judgment has not yet been entered in terms of the arbitrator's award, and Mr Galbraith for Rainbow made it clear that his client intends appealing to this Court against Hillyer J's decision upholding it. However, he also said he would consent to the entry of judgment in terms of the award and apply for a stay of execution pending that appeal, thereby seeking to perpetuate arrangements entered into under a previous order of the High Court whereby a sum paid by Rainbow into Court is to be held pending the outcome of these various appeals.

This has caused Ryde Holdings and those connected with it considerable financial hardship. Mr Atkinson, counsel for that company and for the Meates' family interests in it, informed us that without some substantial payment on account under the judgment in the near future, their situation will become impossible. Indeed, the leading figure in Ryde (Mr Kevin Meates) has already been adjudged bankrupt and his family home is to be sold by the first mortgagee on 1 June next. Petitions are outstanding against other members of the family, who are creditors of Ryde. It is against this background that he sought to have Rainbow's application for leave to appeal brought on now, in the hope of achieving some finality on that before he seeks reconsideration by the

High Court of the present arrangements for a stay of execution.

At the core of the litigation is the finding by Hillyer J that Ryde was entitled to have its claims decided on the basis of 100% of the income from the machines rather than Rainbow's suggested apportionment of 15%. If Rainbow is correct, it will make a substantial difference to the figure to which Ryde is entitled, because the arbitrator made his award in its favour on the basis of 100%.

Against this background the present Motion for grant of conditional leave is to be determined. The first issue raised by Mr Atkinson is that the Notice of Motion itself must be regarded as a nullity. It was served by fax (to which there is no objection), followed up with a copy by ordinary post, on Ryde's solicitors on 26 November 1990. It was in the form of a Notice of Motion for Conditional Leave, but with the date of hearing left blank. In a covering letter the respondent's solicitors were advised that they would be served with a Notice bearing the date on which the Motion was to be heard, once that information was to hand. The fax stated that the Motion would be filed in the Court of Appeal on 27 November 1990, i.e. the following day.

Mr Atkinson submitted that this was nothing more than an expression of intention by the appellant's solicitors to file a Motion and was not appropriate as notice contemplated

by the Rules. Rule 4 of the Privy Council Rules states that application to this Court for leave to appeal is to be made by a Motion in the Court at the time when judgment is given, or by notice of motion filed in the Court and served on the opposite party in accordance with the Rules or practice of the Court within 21 days after the date of the judgment appealed from. There is no question about the documents having been sent out of time. We are satisfied that the way in which they were sent to the respondent's solicitors was sufficient to constitute service of an adequate notice under the Rules. They were confirmed shortly afterwards by advice of a hearing date and we do not think that anybody was or could have been misled, or misunderstood the appellant's intention to challenge the judgment of this Court.

The next point is that in form it is a Motion for leave to appeal as of right under Rule 2(a) of the Privy Council Rules, as it stated that the value of matter in dispute under the appeal was $5,000 or upwards. This was clearly a reference to the provisions of Rule 2(a) allowing an appeal as of right from a final judgment of this Court involving that amount. It is now conceded by the appellant that the judgment appealed from is an interlocutory one only, because until the question of the amount has been finally settled by the arbitrator and disposed of by a judgment, it cannot be regarded as final. Leave to appeal is therefore at the discretion of this Court in terms of Rule 2(b), and

Mr Galbraith accepts that the questions involved cannot be regarded as of great general public importance and must come under the rubric of "or otherwise" in that rule.

Mr Atkinson submitted that the Notice in its present form must be regarded as a nullity because of this mis-statement of the grounds. Again we are unable to agree. We think it a proper notice, but containing an error in that respect, which may be appropriately amended. In Biggs v Woodhead [1940] NZLR 276 the Court of Appeal implicitly accepted there was power to amend such a notice. We are satisfied we have the ability to do so. Rule 4 of the Privy Council Rules clearly envisages the invoking of this Court's jurisdiction to receive such a Notice of Motion and to act on it in accordance with the rules and practice of the Court.

The only matter of prejudice which Mr Atkinson seriously raises is that it was not until he arrived here on 11 February 1991 to deal with the application that the appellant acknowledged the appeal did not lie as of right. It was then adjourned at the latter's request because, as mentioned above, there were still other matters outstanding to be determined in the High Court at Auckland. Accordingly, we are satisfied that any such prejudice can be met by an appropriate costs order and that the Notice should be amended to specify the ground under Rule 2(b).

The next question is whether the appellant can bring the case within the "or otherwise" provision as a condition for the exercise of our discretion to grant leave. The only point Mr Galbraith relies on is his client's need to ensure that the crucial issue - i.e. whether apportionment of the amount due to Ryde is to be based on 100% or 15% of the income - will remain available to him for argument before the Privy Council in an appeal against final judgment. Rainbow intends to appeal to Their Lordships when the present round of litigation over the arbitration award is concluded and a final judgment emerges.

We do not think such an objective can be brought within the "or otherwise" qualification of Rule 2(b), which is concerned with matters of substance in the case itself rather than with the procedural ability to raise an issue before the Privy Council. Certainly there would be an injustice if such an issue so critical to Rainbow's ultimate liability could not be resolved in an appeal brought on a final judgment, merely because it had been dealt with at an interlocutory stage. We must say it would be an extraordinary situation if that result did eventuate.

While Mr Atkinson wishes to keep the point open for argument, he frankly accepts that he may well not succeed in his endeavour to preclude that issue from being raised before the Privy Council in an appeal against the final judgment. However Mr Galbraith, in the face of

Mr Atkinson's expressed intention to raise it at that stage, is rightly concerned about the effect on his client, not only in these proceedings, but in later ones threatened, claiming even larger sums through alleged misuse of Ryde's assets by Rainbow. We think his concern can be met if Rainbow were now to present a petition for leave to appeal to the Privy Council in respect of the present interlocutory judgment. This would preserve its position and enable Their Lordships to decide how and when they should deal with the present issues. Even if the present application had been properly brought under Rule 2(b), that course is preferable to having it indefinitely adjourned, with the problems the uncertainty about its disposal seems to have caused to the High Court. Accordingly, we dismiss the Motion to grant conditional leave, making it clear, of course, that this is not intended as an indication by this Court that the issues currently sought to be raised on appeal should not be pursued before the Privy Council at the appropriate time.

The information by Mr Galbraith that he will consent to the entry for judgment in terms of the present award we expect to be given effect to immediately, noting of course that by so doing he does not accept the correctness of that judgment. We would then expect an early appeal to this Court to be instituted, if that is still Rainbow's intention. Mr Galbraith also intends to apply to the High Court for a stay of execution of that latest judgment, and

the Judge dealing with it will no doubt give due consideration to the terms upon which it or any order for payment might be granted.

The respondent is entitled to costs of $2,000 which will cover the hearing on 11 February and the appearances and hearings of 1 and 2 May 1991, together with diusbursements, travel and accommodation costs as approved by the Registrar.

M.G. Casey J

Solicitors:

Rudd Watts & Stone, Wellington, for Appellant
Parry Field & Co. Christchurch, for Respondent